United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1194

To be argued by
RONALD L. GARNETT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1194

UNITED STATES OF AMERICA,
Appellee,

—v.—

ARNOLD PERER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Arnold Perer appeals from a judgment of conviction entered on December 17, 1974, in the United States District Court for the Southern District of New York, after a three-day jury trial before the Honorable Charles L. Brieant, Jr., United States District Judge.

Indictment 74 Cr. 529, filed May 21, 1974, charged Perer in two counts with engaging in the business of dealing in firearms in violation of Title 18, United States Code, Sections 922(a)(1), 924(a) and 2, and with interstate transportation of twenty-eight firearms in violation of Title 18, United States Code, Sections 922(a)(3), 924(a) and 2.

Trial commenced before Judge Brieant on October 29, 1974. On October 31, 1974, Perer was found guilty on both counts of the Indictment. On December 17, 1974 Judge

Brieant sentenced Perer to a term of not less than one year and not more than five years on each of the two counts, to run concurrently. Perer has been enlarged on bail pending this appeal.

Statement of Facts

Government's Case

The Government's case consisted of stipulations, exhibits and the testimony of three special agents, two of whom had been working in undercover capacities. On October 14, 1973, while working in an undercover capacity, Agent Vincent Mazzilli of the Alcohol, Tobacco & Firearms Division, United States Treasury Department, was introduced to Arnold Perer by a confidential informant, Alexander Rojas,* for the purpose of purchasing firearms (Tr. 12).** Perer said that within one week he would have four .38 caliber revolvers for sale at $150 each. Perer then gave Mazzilli his business card, circling his own name and telephone number, for the agent to contact him to find out when and where the purchase would be made (Tr. 12-14; GX 1).

Two days later, pursuant to a telephone call between them, Agent Mazzilli met Perer at the Julius Rivera Insurance Agency, Bronx, New York, to meet Perer's con-

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* Rojas had been arrested by Mazzilli on July 16, 1973 for dealing in firearms without a license and had agreed to cooperate with the authorities in revealing his sources. Rojas cooperated by giving Mazzilli information in one other case (Tr. 75, 78, 79). He also gave information to other Federal agencies in five other cases (Tr. 111). Rojas later pleaded guilty to the unlawful transportation of firearms and was sentenced on January 22, 1974 by United States District Judge Thomas P. Griesa to a term of six years pursuant to Title 18, United States Code, Section 5010(b).

** Numerical references are to the page numbers of the trial transcript.

nection, who would have the guns. The guns were not purchased at that time. Later during the week Mazzilli called Perer, at Perer's instruction, and Perer told him that the deal did not occur because he, Perer, had missed his connection (Tr. 16-17). Again Perer instructed Mazzilli to contact him thereafter to ascertain if the deal to purchase the guns was still alive. A few days later Mazzilli called Perer who informed him that his connection had missed another appointment with Perer and had been arrested (Tr. 18).

On November 7, 1973, Perer called Mazzilli at an undercover telephone number and left a message for Mazzilli to call him. Mazzilli did so and a meeting was arranged for that evening (Tr. 19, 20). Agents Mazzilli and Alexander D'Atri met Perer later in the lobby of Perer's building at 808 Adee Avenue in the Bronx. At that meeting Perer stated that he knew there were undercover agents in the area and that he was afraid agents, in undercover capacities, might be buying guns and narcotics. He also stated that Rojas had been arrested and released the next day and, therefore, that Rojas must have been cooperating with agents. As the agents were about to leave, Kenneth Hochman entered the lobby and was introduced by Perer to Mazzilli and D'Atri. Perer then offered to sell Mazzilli a .32 caliber automatic pistol for $200. Mazzilli declined and told Perer if he got any guns in the future to contact him (Tr. 22-24).

On Friday, November 23, 1973, Mazzilli again called Perer as a result of information he had received that Perer had received a load of guns. That evening Mazzilli and D'Atri met with Perer in front of the building at 808 Adee Avenue. Perer told them that his connection (Hochman) would be there with the guns in a few minutes. While waiting Perer told Mazzilli that he wanted $200 for small caliber guns and $225 for larger caliber guns, stating that he had .22, .25, .32 and .38 caliber weapons. Hochman

then arrived. Mazzilli argued that the price was too high, and Hochman, in Perer's presence, then said that the prices were what he had to get for them. Following this exchange Mazzilli, Perer and Hochman retreated to the rear courtyard of the building (Tr. 26).

Mazzilli again discussed the price of the guns, asking Perer if he could lower the price. Perer said Hochman had spent $1,100 in expenses in going down South to buy the guns and that they had to get the price they were asking to cover these expenses. Mazzilli again asked Hochman about a lower price and Hochman told him unequivocally that if he did not want to purchase the guns, other people would. Mazzilli then purchased two guns (GX 2A and 2B; Tr. 27-28). Mazzilli paid Perer $200 for his role in the transaction and then paid Hochman $225 (Tr. 31, 94). Mazzilli then offered to buy more guns from Perer and Hochman on the following Monday, November 26, 1974. Hochman and Perer agreed (Tr. 33). Mazzilli again requested a better price for the weapons and was told by Hochman that the price would be lower only if Mazzilli bought weapons in volume (Tr. 35).

On Monday, November 26, 1973, Agents Mazzilli and D'Atri met Perer in his apartment in the presence of Ramona Perer, appellant's wife. Perer told the agents that the guns they were purchasing had been purchased down South by his "partner", Kenneth Hochman, with a phony driver's license. He also stated he had made "a few bucks" and a handgun on the last deal with the agents (Tr. 37-38). Shortly thereafter, Hochman entered the apartment with several handguns, and again said the price was the same as the earlier purchases. Mazzilli argued for a lower price. Hochman said the price could only be lower if the agents purchased at least ten guns. Three guns were then sold to the agents (GX 2C, 2D, 2E). Again Mazzilli paid Perer and Hochman $200 each for their respective parts in the sale (Tr. 103).

The agents then ordered twenty more guns. Perer stated that Hochman and he were going down South and would have the guns in a week. He instructed Mazzilli to contact him during the week to make sure they still would be making the trip (Tr. 39-40, 55-56).

While these negotiations continued, there was a knock at the door, which was answered by Perer. Agent Mazzilli overheard Perer tell the person at the door to return in twenty minutes. Perer then returned to the agents, Hochman and Ramona Perer and said, "It is another guy who wants to purchase a weapon" (Tr. 54, 55).

In accordance with Perer's instructions, Mazzilli called Perer on the following Wednesday or Thursday. Perer said there had been mechanical problems with his car and he would not be going South until the following weekend, December 7th or 8th. On the following Wednesday, December 5, 1973, Mazzilli again called Perer, as instructed, and was told by Perer that he (Perer) was leaving on Friday night, December 7, 1973. During this telephone conversation Perer was reassured by Agent D'Atri that the money for the guns would be available when Perer returned from down South (Tr. 55-57).

On the morning of December 9, 1973, Agents Mazzilli and Anthony Varcos were stationed at the New Jersey end of the upper roadway of the George Washington Bridge. At approximately 2:00 a.m. Perer's car was observed entering a toll booth. The agents began following the car into New York and after a short while arrested Perer and Hochman (Tr. 61, 62). Twenty-eight handguns and ammunition were seized from the car (Tr. 63-65, 68, 135; GX 2F-2Z, 2AA-2LL). The agents then executed a search warrant on Perer's apartment and seized three more handguns and three long guns (Tr. 66; GX 2MM-2RR).

Defense Case

Perer first called Alexander Rojas.* Rojas testified he had purchased guns from Perer on several occasions even before he had met and been arrested by Agent Mazzilli in July 1974 (Tr. 171, 173, 176, 177).** Rojas also testified that prior to his arrest by Mazzilli, he had purchased a gun from Hochman as well (Tr. 162-63). Rojas further testified that after his arrest by Mazzilli in July 1974, and while working as an informant, he had gone to Perer's house on many occasions to discuss purchasing guns, to purchase guns and to pick up things he needed for himself. Subsequent to his arrest Rojas had told Perer he had a person who would purchase a number of guns. Thereafter, in a park, Perer introduced Rojas to Hochman, Perer's partner. There all three discussed supplying a large quantity of guns to Rojas' customers, *i.e.,* the agents (Tr. 163). Rojas entered into an agreement with Perer and Hochman which provided that Rojas would receive one gun for every five guns they sold to the agents (Tr. 159). Rojas also testified that he had purchased guns from Perer while working as an informant, without the agents' knowledge, to make more money for himself (Tr. 158-61). Specifically, he testified that he had purchased a gun from Perer in Perer's apartment and that Perer had told him it was Hochman's gun (Tr. 161).

Perer then called Kenneth Hochman who testified that Perer had purchased in Virginia an identification card which showed Perer to be a resident of Virginia (Tr. 205;

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* Perer asserts here (Perer Brief, p. 9), that the defense was forced to treat Rojas and Hochman as hostile witnesses. This assertion is untrue. Judge Brieant made it abundantly clear that the witnesses were equally available to both the Government and the defense, and at no time were the witnesses declared hostile (Tr. 128-30).

** On one such occasion he had purchased a gun from Perer in an incident involving a truck driver, where Rojas handed Perer the money and Perer handed Rojas the gun (Tr. 173).

GX 6) and which was used by Perer in purchasing the guns in Virginia.

The defense next called Ramona Perer, Perer's wife, who denied her husband had either discussed selling guns or sold any guns in their apartment to Rojas or anyone else (Tr. 216, 220c, 221). She admitted that Mazzilli, D'Atri, and Hochman had met her husband in their apartment, but denied Hochman had ever brought guns to her husband. She admitted she would lie to help her husband, but asserted she would not do so when under oath to help him (Tr. 222).

Following testimony by three character witnesses, Perer testified in his own behalf. On direct examination, he testified he had a prior arrest for possession of a gun, had been an addict for 13 years and had supported his addiction by shoplifting and petty thefts (Tr. 237, 238). On both direct and cross-examination, he asserted he had never been arrested for a crime of violence (Tr. 238, 247). He acknowledged that Hochman was his cousin by marriage (Tr. 241-42), and admitted he had purchased false identification and used the latter to purchase fifteen guns in Virginia (Tr. 244, 245, 259, 260). He denied, however, that he had ever purchased guns for resale other than the guns purchased in Virginia. He denied ever selling guns or participating in the sale of guns to anyone (Tr. 246). Perer did acknowledge that he was present at the negotiations for guns between the agents and Hochman (Tr. 259), but testified that he never discussed money with the agents, assertedly because Hochman would not allow him to do so. Contrary to the agents' testimony, Perer denied receiving any money from the gun sales, admitting only that he had received a pistol (Tr. 255-56). He further asserted that the agents pressured him by coming to his house two or three times a day and offering him more and more money if he would buy guns for them (Tr. 253, 257). Finally, Perer testified he knew it was illegal to transport the guns from Virginia to New York (Tr. 261).

ARGUMENT

POINT I

Judge Brieant properly submitted to the jury the factually disputed issue of entrapment.

Perer complains that Judge Brieant was required to have found entrapment "as a matter of law" since, assertedly, the evidence mandated a finding that the Government induced him, who was without predisposition, to commit the crimes charged. He further claims that, irrespective of his predisposition, the Government's conduct exceeded the bounds of fundamental fairness, thereby requiring a finding of entrapment "as a matter of law". Finally, Perer alternatively urges this Court to create an exception to the standard definition of entrapment, reaffirmed in *United States* v. *Russell*, 411 U.S. 423 (1973), which would require a finding of entrapment "as a matter of law" where there is assertedly but slight evidence of predisposition combined with governmental conduct of the kind in the instant case. The contentions are frivolous.

This Court has said, in well settled terms, that:

> "[I]n [entrapment] cases two questions of fact arise: (1) did the agent induce the accused to commit the offense charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense. On the first question the accused has the burden; on the second the prosecution has it." *United States* v. *Sherman*, 200 F.2d 880, 882-83 (2d Cir. 1952).

Accord, United States v. *Nieves*, 451 F.2d 836, 837 (2d Cir. 1971); *United States* v. *Greenberg*, 444 F.2d 369, 371 (2d Cir.), *cert. denied*, 404 U.S. 853 (1971).*

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* For a recent discussion of a formulation more favorable to the Government, see *United States* v. *Miley*, Dkt. No. 75-2207 (2d Cir. March 19, 1975) slip op. 2363, 2390 n. 8.

Assuming *arguendo* that Perer met his burden on inducement, thereby requiring the Government to prove his "predisposition" to commit the crimes charged, there clearly was abundant evidence which, if believed, sufficed to establish that Perer (1) previously had engaged in criminal conduct similar to the crimes charged, (2) had a design to commit the crimes charged which antedated any inducement, and (3) was willing to commit those crimes as evidenced by his ready response to the Government proposals. *See United States* v. *Viviano*, 437 F.2d 295, 299 (2d Cir.), *cert. denied*, 402 U.S. 983 (1971). Accordingly, Judge Brieant was not only warranted but required to submit the issue of entrapment to the jury, as he properly did, under instructions challenged neither here nor below. *See United States* v. *Rosner*, 485 F.2d 1213 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974).

In contrast to Perer's claim that as a matter of law the evidence established that "the Government lured, persuaded and seduced" him to engage in criminal conduct (Perer Brief, p. 13), Rojas, who was called by the defense, testified that even prior to his arrest and informant status in July 1973, he had purchased guns from Perer (Tr. 171, 173, 176, 177). Rojas further testified that even after becoming a Government informant in July 1973, he continued, without the agents' knowledge, to purchase guns from Perer to sell for his own profit. In so doing, Rojas was obivously not required to induce or corrupt an otherwise innocent man. He went to Perer because he knew, based on past dealings, that Perer was dealing in guns. Perer, of course, flatly denied Rojas' version of the history of their contacts and, indeed, denied ever selling or participating in the sale of guns to anyone (Tr. 246). In contrast, Rojas further testified that Perer had introduced him to Hochman, Perer's cousin, whom Perer had described as his "partner" and a supplier of guns.

Perer's assertion that the Government agents unceasingly sought to entrap him by repeated calls and visits to his home in which they offered increased financial gain was contradicted not only by Rojas, as noted, but by agents Mazzilli and D'Atri as well. Mazzilli testified that he had never met Perer before October 14, 1973, although he had seen Perer ten days before meeting him (Tr. 78, 79).* He also testified that he had called Perer or had gone to see him six or seven times (Tr. 83) from October 14, 1973 to November 7, 1973. However, he called and spoke with Perer, at Perer's instruction or in returning Perer's calls (Tr. 87), on only three occasions and saw him on only three occasions (Tr. 13, 16-18, 20, 22). Mazzilli further testified that between November 7, 1973, and November 23, 1973, the date of the first sale, he telephoned Perer two times and saw him only once, on November 23, 1973 (Tr. 84). Again, at least one-half of these telephone calls and meetings were at Perer's request or instruction (Tr. 111). Perer's testimony of the substance of these meetings sharply contradicts the clear and unambiguous testimony of agents Mazzilli and D'Atri.

Mazzilli testified that at no time did Perer hesitate to accept the opportunity to sell the guns, but rather argued for increased sales prices above the original $150 which

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* Although Rojas testified he introduced Mazzilli to Perer, he was vague and unsure of the date of that introduction. On Rojas' direct, the following exchange occurred (Tr. 148):

> Q. Did you introduce Arnold Perer to Vincent Mazzilli? A. Yes, I did.
>
> Q. Will you tell us when, approximately, you did the introducing of Mr. Perer? A. I really don't know. I could say it was maybe about July, in that area, July or August.
>
> Q. 1973, last year? A. It is hard for me to recollect because I have been in jail over a year now. It is hard for me to remember dates.

was quoted at their first meeting on October 14, 1973 (Tr. 26, 27, 39). *See United States* v. *Principe*, 482 F.2d 60, 62 (1st Cir. 1973). At that original meeting Perer negotiated for the sale of several weapons (Tr. 12, 13). On November 23 and again on November 26, 1973, Mazzilli paid Perer $200 for the guns purchased (Tr. 31, 94, 103). In the discussions on those dates Perer displayed an intimate familiarity with the expenses that his partner, Hochman, had incurred in traveling South to obtain the guns. Perer, moreover, had told the agents at the November 23, 1973 meeting that the person who had come to the door of his apartment on that date was interested in purchasing weapons from him (Perer) (Tr. 54, 55). Perer, in contrast, unequivocally denied any participation in these negotiations and sales, and denied receiving any money from the agents. Finally, of course, Perer admitted to having traveled to Virginia with Hochman in December, 1973, and to having obtained there, with false identification, a cache of arms for resale.

In the face of the foregoing, Perer's assertion that Judge Brieant was required to find that as a matter of law Perer had been entrapped is simply ludicrous. In *United States* v. *Rosner*, 485 F.2d 1213, 1222 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974), this Court rejected a similar claim and said:

> "There is not enough credible evidence, without the testimony of the appellant himself, to sustain the defense of entrapment. The trial court need not accept the defendant's version as true or take the question of his credibility from the jury. 'The truth of the matter was for the jury to determine.' [Citing *Osborne* v. *United States*, 385 U.S. 323, 331 (1966); *United States* v. *Braver*, 450 F.2d 799, 803 (2d Cir. 1971), *cert. denied*, 405 U.S. 1064 (1972)]."

See also Masciale v. *United States*, 356 U.S. 386 (1958); *United States* v. *Morrison*, 348 F.2d 1003 (2d Cir.), *cert. denied*, 382 U.S. 905 (1965).*

Moreover, at least as regards Count One, which charged Perer with dealing in firearms, it may seriously be doubted that Perer was even entitled to a charge on entrapment, much less a finding of the same as a matter of law. In substance, Perer did not admit but rather denied all of the elements of that crime. In the words of this Court in *United States* v. *Alford*, 373 F.2d 508, 510 (2d Cir.), *cert. denied*, 389 U.S. 937 (1967), if the jury believed the Government's testimony, Perer was eager to make the sales and thus deal in firearms; if it believed Perer, he never participated in or made those sales. This Court has said that under some circumstances the assertion of inconsistent defenses (denial of the commission of the offense intoned in tandem with a claim of entrapment) may disentitle a defendant to *any* instruction concerning entrapment. *See United States* v. *Alford*, *supra*, 373 F.2d at 509; *United States* v. *Bishop*, 367 F.2d 806, 809 n. 4 (2d Cir. 1969); *United States* v. *Braver*, 450 F.2d 799, 802 n. 7 (2d Cir. 1971); *United States* v. *Marcello*, 423 F.2d 993, 1011 (2d Cir. 1970); *United States* v. *Henry*, 417 F.2d 267, 270-71 (2d Cir. 1969), *cert. denied*, 397 U.S. 953 (1970).

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* Perer's reliance on *Sherman* v. *United States*, 356 U.S. 369 (1958), is misplaced. In *Sherman*, a narcotic case, the court found from the *undisputed testimony* of the Government witnesses that the defendant was not a trafficker in drugs, that he did not profit from the sales, that he hesitated before committing the crime, that he was unready to engage in the sales, and that there were no drugs on his premises when searched. Here, there is testimony by Government witnesses and others that Perer was selling weapons at the time the agents met him, that he profited from the sales to the agents (Tr. 255-56), that he was ready and willing to engage in the instant sales, among others, and that several weapons were seized pursuant to the search warrant executed in his premises. In short, there is no evidence, save Perer's testimony, to suggest that Perer displayed the slightest hesitancy in taking advantage of the agents' solicitation.

Finally, Perer's reliance on the *dictum* in *United States* v. *Russell, supra,* is totally inapposite in view of the foregoing discussion of the facts of this case. His version of the facts flatly contradicts the version adduced through the agents and Rojas. If Mazzilli and Rojas were believed, as apparently they were, there was clearly no shocking conduct exceeding the bounds of fundamental fairness. Indeed, even if the facts were as Perer fashioned them, there could be no such finding. *Compare United States* v. *Russell, supra; Sherman* v. *United States, supra; Sorrells* v. *United States,* 287 U.S. 435 (1932).

POINT II

The prosecutor's cross-examination of Perer about certain prior arrests was proper.

Perer argues that the prosecutor committed plain error by asking him on cross-examination whether he had been arrested in 1969 for attempted use of a deadly weapon and for offensive use of a weapon, and arrested on an unspecified date for the unlawful use of heroin. The argument is unsound and conveniently omits mention of Perer's direct testimony which provided ample proper grounds for the first two of the prosecutor's questions and rendered harmless any technical error with respect to the third.

Perer on his direct examination testified in pertinent part as follows:

> Q. Were you ever arrested for a crime of violence? A. No.
>
> Q. There has been mention that you had a gun—at one time you were arrested for the possession of a gun, is that correct? A. Yes.
>
> Q. How old were you then? A. 19 years old (Tr. 238).

In truth, Perer's "rap sheet" * showed he had been twice arrested in 1969 for attempted use of a deadly weapon and for offensive use of a weapon—both certainly arrests for crimes of violence and both evidencing gun arrests additional to the admitted one in 1961 or 1962 when Perer was 19 years old, which Perer's direct testimony implied was the only such gun arrest. Perer's earlier efforts on direct examination to paint himself as something other than he apparently was provided ample basis for the prosecutor's inquiries. Matters not ordinarily the proper subject of a defendant's cross-examination to impeach credibility generally are proper to contradict a specific false factual assertion gratuitously elicited on a defendant's direct examination. *United States* v. *Keilly*, 445 F.2d 1285, 1288-89 (2d Cir. 1971), *cert. denied*, 406 U.S. 962 (1972); *United United States* v. *Glasser*, *supra*, 443 F.2d 994, 1002-03 (2d Cir), *cert. denied*, 404 U.S. 854 (1971); *United States* v. *Nagelberg*, 434 F.2d 585 (2d Cir. 1970), *cert. denied*, 401 U.S. 939 (1971); *see United States* v. *Colletti*, 245 F.2d 781, 782 (2d Cir.), *cert. denied*, 355 U.S. 874 (1957).**

Moreover, Perer's record of 1969 gun arrests was highly pertinent to Perer's defense of entrapment on the issue of his predisposition to commit the firearm violations with which he was charged. There was, accordingly, a wholly independent and proper predicate for the prosecutor's questions. *See United States* v. *Cohen*, 489 F.2d 945 (2d Cir.

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* A copy of this document is attached to the affidavit of Assistant United States Attorney Ronald L. Garnett, sworn to on April 18, 1975, and filed with this Court in opposition to Perer's application for bail pending appeal.

** Perer's quotation here (Perer Brief, p. 35) of the challenged questions and answers conveniently neglects to include the prosecutor's immediately preceding question and Perer's response:

> Q. Mr. Perer, you testified on your direct examination that you had never been arrested for a crime of violence, is that right? A. That is right (Tr. 247).

1973); *United States* v. *Abbadessa*, 470 F.2d 1333 (10th Cir. 1972); *United States* v. *Bishop*, 367 F.2d 806, 809 n. 5 (2d Cir. 1966); *Pulido* v. *United States*, 425 F.2d 1391 (9th Cir. 1970). Moreover, with dubious regard for the truth, Peter denied those gun arrests and the prosecutor did not thereafter offer extrinsic proof of the falsity of that testimony as was fully entitled to do. In these circumstances Perer can hardly be said to have been prejudiced.

While the prosecutor's question regarding Perer's Patterson, New Jersey arrest for the unlawful use of heroin may technically have been in error (but see Rule 608(b), Proposed Federal Rules of Evidence), no conceivable prejudice to Perer occurred as a result. Perer on direct examination had testified—presumably as a foundation for counsel's later closing argument to the jury of Perer's extreme susceptibility to improper Government inducement and entrapment—that he had been addicted to narcotics for 13 years until the age of 28, and had sold drugs and committed countless thefts to support his addiction. The fact that Perer had once been arrested for the use of drugs * could hardly have added anything to the jury's abundant knowledge, provided by Perer on direct, of Perer's history of addiction, drug sales and thefts. In these circumstances, and in the absence of any request from defense counsel, Perer's limited admission of such an arrest in response to a single question is clearly not "plain error" affecting substantial rights of Perer's. The trial court, in any event, gave a limiting instruction, albeit in somewhat conditional terms.

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* Perer's rap sheet showed, *inter alia*, arrests for the unlawful use of heroin on September 9 and 11, 1969 in Wayne and Patterson, New Jersey, respectively. The Wayne arrest apparently resulted in a conviction and the imposition of a six month prison term.

POINT III

The prosecutor's summation was entirely proper.

Finally, Perer argues here, for the first time, that the prosecutor's summation was improper.* Put most simply, Perer argues that the prosecutor placed the prestige of the United States Government behind the credibility of the witnesses for the prosecution and thus unfairly bolstered their testimony and the Government's case. The argument is wholly without merit.

The challenged remarks of the prosecutor followed and were in response to defense counsel's repeated argument in summation that the Government agents had lied to the jury. Thus, defense counsel urged:

> Now, he [Mazzilli] told us how he got to meet Arnold Perer, but he told us something was either a mistruth or in error or he was not totally leveling with us . . . (Tr. 288). We know that is not true from Mr. Rojas testimony . . . (Tr. 289).
>
> * * *
>
> . . . [W]e went forward and our first witness was Alex Rojas. Alex Rojas was originally intended to be a Government witness, but they knew him to be the little hoodlum that he is . . . (Tr. 292).
>
> * * *
>
> Rojas is buying his freedom and he inveigles. The conversations start not in October, as Mr. Mazzilli

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* Perer's utter failure below to bring this alleged error to the attention of the trial court—by an objection, a motion to strike, a request for a cautionary instruction or a motion for a new trial—itself warrants denial of this asserted ground for relief. *United States* v. *Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-39 (1940).

> said, but in July, three months earlier. Why did they lie about that? They lied about that for a very simple reason: entrapment. If you show they were able to persuade and induce the man over a period of time and apply pressure, you have got entrapment. So if you cut off a couple of months, there is less pressure and you apparently don't have enrtapment anymore ... (Tr. 294).
>
> * * *
>
> He (Perer) told us what Mazzilli said to him or in front of him to Hochman. He said, "Mr. Mazzilli said 'why did you drag him into it?'" Mazzilli knew that Perer was not involved up until this point. It was Hochman. In fact, Mazzilli must have gotten tired of working with Perer (Tr. 302).

The challenged remarks of the prosecutor which followed did no more than seek to dispel any implication left by defense counsel's above quoted attacks that the prosecution had knowingly employed perjurious testimony in an effort to convict Perer. The prosecutor's remarks contained no expressions of his personal belief of the guilt or innocence of the defendant, nor did they otherwise invade the jury's province. But their plain meaning and intendment, the remarks properly left to the jury the determination whether the agents had testified truthfully or not.*

Moreover, in light of the categorical assertions of defense counsel that Mazzilli had distorted the truth and lied in order to convict Perer, it was no more than fair reply for the prosecutor to comment as he did. Indeed, the

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* Perer's assertion (Perer Brief, p. 42), without support of a record reference, that as a result of the challenged remarks, Judge Brieant saw fit to give a limiting instruction, which was nonetheless ineffectual, is totally incorrect. No such instruction was ever given, requested or thought to be necessary by anyone below, including Judge Brieant.

prosecutor's comments here were much more measured than those at issue in *United States* v. *La Sorsa*, 480 F.2d 522 (2d Cir.), *cert denied*, 414 U.S. 855 (1973). In that case, which concerned similar attacks upon Government witnesses, this Court acknowledged the right of prosecutors to reply to unfounded attacks upon the motives of the Government, and said:

> "However, here, it is manifest from even a casual reading of the jury arguments of defense counsel that the prosecution was only meeting the defense on a level of the defense's own choosing. The defense had, indeed, insinuated precisely the type of prosecutorial misconduct which the prosecutor was attempting to refute in his argument to the jury, so quite justifiably, he argued responsively that the Government had not 'framed' the defendants and that, if the jury thought the Government had done so, it should acquit them . . . . In view of these attacks against the very integrity of the prosecution the prosecutor was certainly entitled to reply with rebutting language suitable to the occasion [citations ommitted]." Id. at 526.

See Lawn v. *United States*, 355 U.S. 339, 359-60 n. 15 (1958); *United States* v. *Tramunti et al.*, Dkt. No. 74-1550 etc. (2d Cir. March 7, 1975), slip op. 2107, 2164-65; *United States* v. *Bivona*, 487 F.2d 443, 445-48 (2d Cir. 1973); *United States* v. *Davis*, 487 F.2d 112, 124-25 (5th Cir. 1973), *cert. denied* 415 U.S. 981 (1974); *United States* v. *Santana*, 485 F.2d 365, 370-71 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); *United States* v. *Benter*, 457 F.2d 1174, 1176-77 (2d Cir.), *cert. denied*, 409 U.S. 842 (1972). *United States* v. *Hager*, 505 F.2d 737, 740 (8th Cir. 1974); *cf. United States* v. *Mallah*, 503 F.2d 971, 978-79 (2d Cir. 1974); *United States* v. *Greenbank*, 491 F.2d 184, 188 (9th Cir. 1974); *United States* v. *DeAngelis*, 490 F.2d 1004, 1011 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974);

United States v. *White*, 486 F.2d 204, 205-7 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974); *United States* v. *McCarthy*, 473 F.2d 300, 305 (2d Cir. 1972); *United States* v. *Lipton*, 467 F.2d 1161, 1168-69 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973); *United States* v. *Kravitz*, 281 F.2d 581, 586 (3d Cir. 1960), *cert. denied*, 364 U.S. 941 (1961). The Government's summation was well within permissible limits.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Form 280 A. -Affidavit of Service by Mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

OLGA C. GRAMPP being duly sworn deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

Stating also that on the 25th day of June U. S. -v-s he served a copy of the within Brief (Arnold Perer) by placing the same in aproperly postpaid franked envelope addressed: Harold Baer, Jr. , Esq.
(atty for Arnold Perer)
80 Pine Street, New York, N. Y. 10005

And deponent further says that she sealed the said envelope and placed the same in the mailbox for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York

Olga C. Grampp

Sworn to me before this

25th day of June , 1975

Mary L. Avent

MARY LAVENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977